APPEAL NO. 93455

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On May 5, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issue at the contested case hearing concerned the appellant's (claimant herein) proper impairment rating. The hearing officer found that the claimant had reached MMI on May 7, 1992, with an eight percent whole body impairment rating based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals requesting that the Appeals Panel review the decision made by the hearing officer concerning his case and arguing that the designated doctor's rating could not be based upon the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) because he did not perform any measurements as required by the Guides. The respondent (carrier herein) replies that the designated doctor explained how he arrived at the impairment rating he assessed pursuant to the AMA Guides, that the opinion of the designated doctor should be given presumptive weight, that testimony concerning the inadequacy of a physical exam is not sufficient to overcome the presumption given to the opinion of the designated doctor, and that there is sufficient evidence to support the determination of the hearing officer.

DECISION

Finding sufficient evidence to support the decision and order of the hearing officer, we affirm.

The claimant and his wife appeared at the CCH. The ombudsman was not present, and the hearing officer gave the claimant an opportunity to request a delay of the CCH so he could hire an attorney or wait until the ombudsman was available. The claimant stated that since he had been unable to find an attorney who would represent him and was dissatisfied with the ombudsman who he claimed had failed to help him at the benefit review conference (BRC), he had no choice but to continue on with the hearing.

The claimant testified that he was injured on (date of injury), while employed as a state inspector and general serviceman by a service station. He said that when a coemployee who was mounting a tire asked for help, he began assisting the coworker to mount a truck tire. The claimant then related that the tire exploded with his arm caught in it crushing his right hand and injuring his right arm. The claimant contended that the sound of the exploding tire was loud enough to temporarily deafen him and was to bring people running from across the street.

The claimant testified that he was taken to the emergency room of the closest hospital and was treated by the doctor on duty, (Dr. S), who operated on claimant's hand that day. The claimant stated that Dr. S performed a second operation two days later. The claimant said that after being released from the hospital he remained under Dr. S's care.

In his report of May 7, 1992, describing the claimant's follow-up visit for "right forearm with a grade I open ulna fracture," Dr. S states:

> He [the claimant] states he continues to improve, but he has pain in that arm and has difficulty sleeping. He complains of weakness and loss of motion. He has been going to physical therapy with [hand clinic]. Examination of the progress report states that he has reached a plateau now. There have (sic) no appreciable differences in range of motion or strengths since April 9, 1992 (sic) evaluation. His examination today reveals that he still has a very moist palm. There is still diffused swelling about the hand and forearm. He is tender to palpation along the complete forearm surface. He is quite weak with grip strength with range of motion of his elbow and wrist and fingers. . . . It is my impression that he has reached his maximum level of maximum medical improvement. He has developed subsequent reflex sympathetic dystrophy from his original injury. At this time, his measurements show a total of 31 percent impairment of the upper extremity. This equals a 19 percent impairment of the body.

A signed Report of Medical Evaluation (TWCC-69) date-stamped received by carrier on June 12, 1992, was admitted into evidence in which Dr. S certified MMI on May 7, 1992, with a 19% impairment rating.

After his May 7, 1992, visit the claimant testified that he attempted to go find to work. He first described working for a Shell station, but stated only worked there for three days because he was unable to do the job. The claimant then testified that he went to work for ST at a local airport, but only worked there a month because, due to weakness in his arm, he was unable to perform the duties of the job which included refueling aircraft. According to the claimant he next went to the Texas Rehabilitation Commission, but was told they could not help him. The claimant stated that at this point a family friend came forward and offered him an office job at a travel agency which he did for seven months, but the claimant said, "I didn't know enough about the travel agency business and I wasn't productive." The claimant testified that at the time of CCH he was out of work. He stated that he had been trying to find another job, but the problem is that all of his training and background is mechanical (he stated that he had schooling as an auto, as well as an aviation, mechanic and at the time of the accident had just been certified as an aircraft mechanic), he had not been able to find one with his physical limitations from his injury.

The claimant testified that he continued treatment for his injuries and that Dr. S had sent him to (Dr. G) for "stellate" shots, apparently to treat reflex sympathetic dystrophy. The claimant testified that the carrier had refused to pay for further injections because it is apparently disputing whether he has reflex sympathetic dystrophy.

The carrier was apparently dissatisfied with the impairment rating issued by Dr. S. According to representations made by the attorney who appeared for the carrier at the CCH, the carrier initially disputed Dr. S's impairment rating and assessed what it believed to a reasonable rating of ten percent. Based upon the carrier's dispute of the rating, the Commission selected a designated doctor, (Dr. M) to examine the claimant. Dr. M examined the claimant on October 13, 1992, stating in his report of that date:

> . . . he has limited motion at the right shoulder, right elbow, right forearm, right wrist and hand, with a disparity between active and passive range of motion. He does not have the seven cardinal signs of reflex sympathetic dystrophy. His symptoms may benefit from a work hardening program. However, I agree he is at maximal (sic) medical improvement. According to the Guides to the Evaluation of Permanent Impairment by the AMA, and in my opinion, he has a 2% impairment for his right hand, 2% impairment for the right wrist, 2% impairment for the right elbow, and 8% impairment for the right shoulder. This sums to a 14% impairment for the right upper extremity, or an 8% impairment for the whole person.

Dr. M certified on a TWCC-69 that the claimant had reached MMI on October 13, 1992, with an eight percent impairment rating.

The claimant testified that the examination by Dr. M was very brief and that Dr. M failed to do many of the tests and measurements that had been performed at a hand clinic Dr. S had sent him prior to rating his impairment. He stated that the measurements of his range motion at the hand clinic took "no less than 3 hours," while Dr. M's entire examination took less than seven minutes. The claimant then testified that the carrier's adjuster on his claim, (Ms. B) wrote a letter to Dr. M asking if as to whether he agreed with Dr. S that the claimant had reached MMI on May 7, 1992, rather than on October 13, 1992. While this letter was not admitted into evidence Dr. M's reply letter was admitted and states as follows:

> Thank you for your recent letter regarding [claimant] dated 11/24/92.
>
> I did perform an independent medical examination for the claimant on 10/13/92. Please find enclosed another copy of this report.
>
> I am sorry for any confusion regarding date of maximum medical improvement. I concur with Dr. S that the date of maximum medical improvement is 5/7/92 for [claimant].
>
> Dr. S has signed a 19% impairment for the claimant, and another physician is signed at 10% impairment for the claimant. In my opinion, according to the Guide for the Evaluation of Permanent Impairment by the AMA, the claimant has an 8% impairment for the

whole person.

Ms. B responds in a letter dated December 22, 1992, Ms. B states:

Thank you for your letter of 12-14-92 (sic) however, I am in need of the "All important" TWCC 69 which reflects your revised date of maximum medical improvement.

I am enclosing a fully completed TWCC 69 for your use. Please complete line 14 showing your revised date of MMI and impairment to the whole person.

Thanks once again for your attention to this matter and I will await the revised TWCC 69.

In another TWCC-69, Dr. M certifies MMI on May 7, 1992 with an eight percent impairment.

A letter from the a carrier's attorney dated March 12, 1993, states in relevant part:

I would also request that you address some contentions that were made by [claimant] at a recent benefit review conference held on this case. [Claimant] is contesting the impairment rating of 8%. In support of his contest, he contends that he was seen by you for only five minutes during which absolutely no range of motion testing was performed. We have a range of motion grid that was submitted along with your report. That grid obviously reflects that measurements were taken. We do have a contested case hearing before the Texas Workers' Compensation Commission set on this case in early May of this year. I would like to have your response to [claimant's] allegations if at all possible for use at that hearing. Accordingly, I would request that you please provide me with a very short narrative explaining the length spent on the examination and addressing the contention by [claimant] concerning the range of motion testing performed.

Thank you in advance for your time and attention to this matter. You may submit any bill for time spent in connection with this request to [Ms. B] at the address listed below.

In a response letter dated March 22, 1993, Dr. M states in part:

I am deeply disturbed by the allegations presented in your letter. This examination required at least 30 minutes contact with the patient in the room to secure the history, perform the physical examination, review the x-rays with the patient, and discuss his treatment options and long-term implications of his problem. The allegations that range of motion testing was not performed are entirely false and unfounded. Range of motion for the shoulder, elbow, forearm,

wrist, and digits of the upper right extremity was performed and reported accordingly.

At the hearing the attorney for the carrier clarified that there had been no rating by a doctor of ten percent, but that the carrier at the time it disputed Dr. S's impairment had assessed ten percent as a reasonable rate pending resolution of the matter. The claimant offered into evidence a signed TWCC-69 from Dr. S dated April 2, 1993, which stated that the claimant had not reached MMI. In an attached narrative report Dr. S states:

There is apparently some disparity between the evaluations by [Dr. M], which occurred in October of 1992. It is my recommendation that a third party evaluate the patient to help determine his MMI, so that his impairment rating can be given.

The claimant testified that the designated doctor did not perform measurements necessary to rate his impairment under the AMA Guides. The designated doctor disputes this and said that he did the necessary measurements. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflict in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In light of the above standard of review we cannot say that there was not sufficient evidence to support the findings of the hearing officer. This is particularly true in light of the presumption accorded to the opinion of the designated doctor regarding MMI and impairment. *See* Article 8308-4.25(b) and 4.26(g) (1989 Act). Further affirming the hearing officer is consistent with our earlier holdings that the testimony of the claimant is in itself insufficient to establish the inadequacy of a medical examination. *See* Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992.

Yet there are other aspects of this case that we find troublesome. The nature of the

unilateral communication between the carrier and the designated doctor, quoted at length above, could tend to compromise the perception, if not the reality, of impartially on the part of the designated doctor in this case. We have commented on this problem in the past. *See* Texas Workers' Compensation Commission Appeal No. 93272, decided May 24, 1993; Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992; Texas Workers' Compensation Commission Appeal No. 93336, decided June 16, 1993. Without the appearance of impartially the entire designated doctor process may be undermined. We appreciate that a party may need a clarification of a statement by a designated doctor; but that party should communicate its need for clarification to the Commission, with notice of its request to all other parties, and allow the Commission to contact the doctor to request clarification. Using this procedure as well as the discovery procedures available, such as deposition on written questions, provides each party sufficient access to the designated doctor for legitimate communication without potentially compromising the impartiality, or appearance thereof, of the designated doctor.

The decision of the hearing officer is affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge